No. 97-7164

In The

Supreme Court of the United States

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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The respondent, apparently unhappy that Congress amended the federal carjacking statute in 1994 to add the element of specific intent, asks the Court to use "common law and common sense," to undo Congress' amendment and rewrite the federal carjacking statute. The respondent's plea to ignore the plain meaning of the statute's specific intent requirement, however, must be directed to Congress, because it is not this Court's function to rewrite statutes to suit the respondent's preferences.

I. The Language Of Section 2219 Requires Reversal Of Petitioner's Conviction

The 1994 amendments to the carjacking statute added an unambiguous requirement of proof of specific intent to cause death or serious bodily harm. Congress unconditionally stated the *mens rea* required for criminal culpability and nowhere included, nor even discussed, the concept of conditional intent now advocated by the respondent. Because fundamental principles of statutory construction require that an unambiguously worded statute be applied in accordance with its terms, judicial authority simply does not exist to deviate from the plain language of the statute by adding in the concept of conditional intent. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The respondent's brief ignores the first canon of statutory construction that "a legislature says in a statute what it means and means in a statute what it says there." *Id.* When, as here, the words of a statute are unambiguous, this first canon of statutory construction is also the last. *Rubin v. United States*, 449

U.S. 424, 430 (1981). The holdings of the Court simply leave no room for the respondent's attempt to ignore the plain language of the carjacking statute by interjecting a more expansive and completely unstated conditional intent concept into the statute. "[B]ecause, under the government's broader reading the statute would mark a major inroad into a domain traditionally left to the states (the Court should) refuse to adopt the broad reading in the absence of a clearer direction from Congress." *United States v. Bass*, 404 U.S. 336, 339 (1971).

The carjacking statute unquestionably involves the intrusion of the federal government into an area which has traditionally been covered by the states, therefore, the need to adhere to the plain language of the statute is even more compelling. Petitioner's Br. at 23. The absence of a "clear statement" of conditional intent in the amended carjacking statute forecloses any further argument that the concept should be added to the law. *Bass*, 404 U.S. at 347.

Nevertheless, the respondent claims that the Court should interpret the statute to include when the defendant intended "to cause death or serious bodily harm, *if necessary*." Respondent's Br. at 20 (emphasis in original). But the respondent never addresses the most obvious and troubling question: If Congress intended such an interpretation, why did Congress leave the words "if necessary" out of the statute? In drafting and enacting the 1994 amendments to the carjacking statute, Congress specifically decided to add a heightened intent requirement. Certainly, Congress had the ability to expressly include conditional intent within the statute if that was its intention. Because Congress "neither stated nor implied" the

concept of conditional intent "when it made the conduct criminal," *United States v. Bailey*, 444 U.S. 394, 407 (1980), petitioner's conviction should be reversed.

II. A Common Law Tradition of Conditional Intent is a Fiction

Absolutely essential to the respondent is its repeated claim that its conditional intent concept is firmly rooted in the common law. Indeed, the respondent explicitly asks the Court to use "common law and common sense" to find a conditional intent element in the statute. Respondent's Br. at 32. The respondent's argument, however, ignores the critical fact that there is "no federal common law of crimes," *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994); *Parratt v. Taylor*, 451 U.S. 527, 531 (1981), and that the elements of a federal crime are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Hudson*, 7 Cranch 32, 33-34 (1812).

The lack of federal criminal common law demonstrates that Congress could not have intended to incorporate a completely unstated common law concept of conditional intent into the statute. Nevertheless, the respondent cites state court cases claiming they represent conclusive proof of the acceptance of the concept of conditional intent. The respondent, in a footnote, also refers to a handful of federal cases which supposedly supports its theory. These cases, however, do not help the respondent because they provide no support for its theory that the Court should accept conditional intent as a proxy for specific intent.

The respondent's reliance on state court precedents as support for a common law tradition of conditional intent principally consists of an early twentieth century decision, *People v. Connors*, 97 N.E. 643, 644-645 (Ill. 1912), and the holding of an Indiana court. *Eby v. State*, 290 N.E.2d 89 (Ind. App. 1972). These two cases, together with other cases the respondent briefly mentions in a footnote, Respondent's Br. at 13, n.4, hardly provide a compelling foundation for a common law tradition of conditional intent. Indeed, the cases conflict with the holdings of several other appellate state courts and the *Eby* case even conflicts with a subsequent Indiana case which explicitly states that the *Eby* court "erred in equating conditional intent with specific intent."[1] *Carter v. State*, 408 N.E.2d 790, 796 n.6 (Ind. App. 1980).

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[1] The cases that the respondent discusses in its footnote provide weak support for the respondent's argument. Some of the cases have nothing to do with conditional intent, *see, e.g., State v. Klein*, 547 P.2d 75, 78 (Mont. 1976) (upholding robbery conviction where defendant pointed a gun at the victim such that he purposely or knowingly put his victim in fear of bodily injury), while others have been overruled or disagreed with by other courts in that very jurisdiction. *See, e.g., Warrick v. United States*, 528 A.2d 438, 442 (D.C. 1987) (Entering a home while carrying a dangerous weapon, "might support an inference that he intended to use the weapon *if* somebody attempted to interfere with his taking of property. *A conviction for burglary may not rest on such an 'if.'* ") (emphasis added); *State v. Irwin*, 285 S.E.2d 345, 349 (N.C. App. 1982) (reversing a conviction for assault with intent to kill because "conditional intent to kill will never be actualized if the condition precedent upon which it is based never occurs"). Moreover, apart from the fact that there is "no federal common law of crimes," the fact that a handful of states may recognize conditional intent, while other states do not, can not be said to make conditional intent part "of our traditional legal concepts," nor does it make conditional intent part of our "widely accepted definitions." *United States v. Gypsum*, 438 U.S. 422, 437 (1978) (citation omitted).

Although these cases are hardly sufficient to establish a common law tradition of conditional intent, they are in fact contradicted by the holdings of other state courts, demonstrating that conditional intent is *not* firmly embedded in common law. For example, the Mississippi Supreme Court correctly held that when "the intent to kill was conditioned upon the happening of some other event, which may, within reason, fail to take place, the real intent to kill and murder does not come into existence." *Craddock v. State*, 37 So. 2d 778, 778 (Miss. 1948) (quoting *Stroud v. State*, 131 Miss. 875, 95 So. 738 (1923)). Similarly, an Ohio court held that "assault with intent to kill" is not established by a conditional threat. *State v. Kinnemore*, 295 N.E.2d 680, 682-683 (Ohio App. 1972); *see also State v. Irwin*, 285 S.E.2d 345, 349 (N.C. App. 1982) (intent to kill cannot be established by a "conditional intent to kill").

Thus, even if state common law was a valid basis for upholding a federal criminal conviction, which it is not, the respondent's contention that state courts have consistently created and adhered to a common law concept of conditional intent is unsupported – and indeed contradicted – by precedent.

The respondent next asserts that federal courts have also applied the concept of conditional intent. But the respondent fails to provide any cases from this Court upholding the concept of conditional intent, because

there are none.[2] Therefore, the respondent is unable to supply any meaningful precedent to support its contention, and is reduced to citing in a footnote, a handful of lower court cases which are irrelevant to the application of conditional intent to a completed crime. *See* Respondent's Br. at 14. Indeed, there are no cases where the federal courts have ever recognized conditional intent as satisfying a required specific intent element for a completed substantive crime.

Many of the cases the respondent cites only involve general intent crimes. *E.g., United States v. Richardson*, 27 F. Cas. 798, 798 (C.C.D.C. 1837) (convicted under general intent standard). Others cases contain clear errors of law. *Schaefer v. United States*, 308 F.2d 654, 655 (5th Cir. 1962) (erroneously holding that intent is not based on the "motive of the actor . . . [but] is to be judged objectively . . . [based on] what one in the position of the victim might reasonably conclude."). Still others address conspiracies. But the conspiracy cases stand for the unremarkable conclusion that conspirators are liable for all foreseeable acts in furtherance of the conspiracy. *See United States v. Anello*, 765 F.2d 253, 262 (1st Cir. 1985) ("agreement to buy that is conditional is nonetheless for *conspiracy purposes* an agreement to buy") (emphasis

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[2] The fact that this Court has never recognized conditional intent further weakens the respondent's argument that the concept of conditional intent is part of "the background of our traditional legal concepts." *See* Respondent's Br. at 19 (internal quotations omitted).

added). Once a defendant agrees to be part of a conspiracy, the fact that some actions might be based on future conditions occurring would not excuse the defendant of his crime of joining the conspiracy because "for purposes of criminal conspiracy, virtually all agreements are to some extent, conditional." *United States v. Dworken*, 855 F.2d 12, 19 (1st. Cir. 1988) (citing *Anello*, 765 F.2d at 263).

The respondent next argues that petitioner's offense should be viewed as analogous to cases where circumstances make it impossible for a defendant to commit an intended crime, but where a conviction for an attempt was nevertheless sustained. Respondent's Br. at 19 n.8 (citing *no* cases for this contention). The respondent's argument is sophistry. Although it can be argued that all unconsummated crimes contain a conditional intent element ("I will shoot you unless I die in the next second"), *see Dworken*, 855 F.2d at 18 ("[i]n all unconsummated crimes, the intent to complete the crime is contingent"), intent is based on the actor's belief that he can and will commit the act. *See infra* at 9-12. Moreover, in petitioner's case there is no issue of impossibility, nor was the crime not completed. Consequently, cases dealing with attempts and impossibility are irrelevant to whether conditional intent to do harm satisfies the specific intent requirement in a completed carjacking.

In sum, there is no federal precedent which supports the proposition that a criminal statute which defines specific intent as an element of a *consummated offense* could be satisfied by a state of mind which failed to emerge during the unfolding of events. In an unconsummated crime there may be a basis for criminalizing presently held intentions to do future harm. After the crime is

completed, however, there is no basis for criminalizing alternative intentions and events which did not unfold. Otherwise, juries would be required to speculate as to whether defendants harbored alternative thoughts and conduct in addition to the conduct they chose to commit.

As petitioner demonstrated in his merits brief, in a case where Congress has explicitly spelled out the mental state required for the commission of a crime, the words of the statute must be taken as the final expression of its purpose. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *Liparota v. United States*, 471 U.S. at 424. Nevertheless, even if an additional inquiry is undertaken, neither federal nor state law provides a persuasive reason for finding that a specific intent to cause serious bodily harm or death can be satisfied by proof of conditional intent. Hence, the respondent's desperate attempt to divert the Court's attention to a consideration of common law ultimately fails to provide any justification for expanding the heightened *mens rea* requirement Congress added to the carjacking statute.

III. The Government's Reliance On The Model Penal Code Is Misplaced

Notwithstanding that Congress has never adopted the Model Penal Code,[3] the respondent turns to the Code as support for acceptance of conditional intent as an element of the crime of carjacking. In discussing the

[3] Moreover, federal courts can not adopt the model penal code because federal crimes are exclusively created by statute. *Liparota v. United States*, 471 U.S. at 424.

Code's formulation of conditional intent, however, the respondent ignores the Code's analysis of an essential component of the concept. The respondent completely ignores the fact that under the Code, conditional intent only satisfies a specific intent element if the actor "is aware or believes or hopes" that the condition on which his conditional intent is based, will occur. Model Penal Code § 2.02(2)(a)(ii). Of course, the respondent must ignore this fact because the district court also failed to recognize this essential component of conditional intent and improperly instructed the jury. Consequently, if the respondent were to concede this point, its case would be lost.

Although the Model Penal Code endorses the concept of conditional intent, the drafters of the Code were very careful to limit its application. The Code allows for conditional intent by stating: "When a particular purpose is an element of an offense, the element is established although such *purpose is conditional. . . .* " Model Penal Code § 2.02(6) (emphasis added). But after including this apparently expansive definition of conditional intent, the drafters greatly limited the reach of conditional intent by stating:

> *A person acts purposely* with respect to a material element of an offense when:
>
> i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; *and*
>
> ii) if the element involves the *attendant circumstances*, he is *aware* of the existence of such circumstances or he *believes or hopes* that they exist.

Model Penal Code § 2.02(2)(a) (emphasis added).

Although the respondent claims that Section 2.02(2)(a)(i) completely defines purpose for conditional intent, Respondent's Br. at 18 n.7, it is wrong. Because conditional intent involves a state of mind which will only exist under certain *attendant circumstances*, Section 2.02(2)(a)(ii) is unquestionably applicable and must be satisfied. In a carjacking, a conditional intent to cause serious bodily harm will only arise if the attendant circumstance that the victim offers resistance occurs. Therefore, to sustain petitioner's conviction, the respondent was required to prove that he was aware that the victim is going to resist, or he believed or hoped that the victim would offer resistance. Because awareness, *i.e.*, knowledge, of a future attendant circumstance could never be guaranteed, the Code allows for the awareness requirement for conditional intent to be satisfied by "a high probability of its [the attendant circumstances] existence." Section 2.02(7). As the respondent never proved the petitioner was *aware* of a high probability that the victims would resist, or that he *hoped or believed* that the victims would resist, his conviction should be overturned.

The respondent's claim that it need only satisfy Section 2.02(2)(a)(i) of the Model Penal Code results in an absurd application of the concept of conditional intent and ignores the careful limitations which the Code has clearly provided. To best understand why the respondent's partial application is incorrect consider the following hypothetical. A wrongdoer holds a person at gunpoint and tells the victim: "If a meteor lands at my

feet in the next three seconds, I will shoot you, otherwise I will let you live." Using the respondent's interpretation of the Code, which completely ignores the attendant circumstance of a meteor landing, the wrongdoer is guilty of attempted murder, or at least assault with intent to kill. Using the correct interpretation of the Code, however, the wrongdoer would only be guilty of these crimes if he either: 1) is *aware* of a high probability that a meteor will land at his feet in the next three seconds; 2) he *believes* a meteor will land at his feet in the next three seconds (ignoring a possible insanity defense); or 3) he *hopes* a meteor will land at his feet in the next three seconds. *See* Paul A Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 741 n.267 (1983) (discussing Model Penal Code's definition of purpose requiring "awareness of the existence of or a belief that the [attendant] circumstance exists"). Therefore, while the Model Penal Code allows conviction for both a reasonable belief and an unreasonable hope, it still requires proof that the defendant possesses a state of mind consistent with an intention to cause the harm that the statute prohibits.

This correct interpretation of the Model Penal Code's approach to conditional intent has been adopted by at least one federal circuit that has adopted conditional intent for unconsummated crimes and conspiracies. The First Circuit has held that "[i]n keeping with the principles of the Model Penal Code, . . . liability should [only] attach if the defendant reasonably believed that the conditions would obtain." *United States v. Dworken*, 855 F.2d 12, 19 (1st Cir. 1988), *accord United States v. Anello*, 765

F.2d 253, 262-63 (1st Cir. 1985).[4] Here, even if the Court finds that the statute encompasses conditional intent, it should still reverse petitioner's conviction because the respondent failed to prove either that he was aware that a victim would resist or that he believed or hoped that a victim would resist.

Not only did the respondent fail to prove petitioner's knowledge, belief or hope regarding whether a victim would resist, but the district court completely failed to instruct the jury on this issue. *See* Petitioner's Br. at 8-9 (quoting the court's jury instruction). Consequently, the jury was able to convict petitioner without even considering whether petitioner was aware or believed or hoped that a victim would resist the carjacking such that it would be necessary to inflict death or serious bodily harm. Thus, even if the Court permitted the concept of conditional intent to be added to the carjacking statute, the district court's complete failure to charge the jury on the issue of petitioner's belief as to whether a victim would resist to the point that it would be necessary to inflict death or serious bodily harm compels the reversal of his conviction.

IV. Neither The Statute's Use Of The Word "Intimidation" Nor Its Sentencing Provisions Support The Government's Attempt To Read Conditional Intent Into The Statute

The respondent also argues that because the carjacking statute criminalizes the taking of a vehicle by "force

[4] Both of these cases were cited approvingly in the respondent's brief. Respondent's Br. at 14-15 n.5.

and violence or intimidation," the heightened intent requirement must encompass conditional intent. According to the respondent, unless conditional intent is read into the statute, "the number of cases in which the crime was committed only 'by intimidation' . . . would be implausibly small," which it claims, without support, that Congress could not have intended. Respondent's Br. at 22-23.[5] The respondent's argument, however, is undermined by both the plain meaning of the statute along with its legislative history.

At the same time it added a heightened intent requirement to the carjacking statute, Congress simply chose to retain the statute's existing language regarding intimidation. Nothing in the legislative history of the amendments supports the conclusion that Congress desired the revised law to have the same scope as the original statute with regard to acts of intimidation. Moreover, petitioner has shown that in enacting the 1994 amendments to the carjacking statute, several legislators were concerned that, by eliminating the possession of a firearm element, federal jurisdiction would be overly expanded to include traditional state law crimes. Petitioner's Br. at 23. Consequently, Congress decided to both *expand* the reach of the statute by removing the firearm requirement and also *reduce* the reach of the statute by

[5] It should be noted that the original statute's requirement that the perpetrator possess a firearm also limited the use of the intimidation clause. It is likely that there would be a small number of cases where a gun was used, but the government could not prove force and violence. Consequently, under the original statute, intimidation also applied to a relatively small number of cases.

requiring the respondent to prove that the offender had the "intent to cause death or serious bodily harm." Thus, it is by no means surprising that following the passage of the 1994 amendments, it would perhaps be more difficult to prove a carjacking effectuated by means of intimidation.

Although the 1994 amendment requiring a specific intent to kill or cause serious bodily harm reduces the number of carjacking prosecutions involving intimidation (as well as carjackings obtained by force and violence), "intimidation" is still a vital part of the statute and can, in no way, be considered surplusage.[6] The amended carjacking statute passed by Congress simply does not have the reach which the respondent desires.

Indeed, the respondent concedes that requiring an unconditional intent to cause death or serious bodily harm, does not make the word "intimidation" surplusage. Rather it only argues that intimidation would apply to an "implausibly small" number of cases. The fact that the intimidation clause might apply to more cases under the

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[6] In his opening brief, petitioner gave two examples of cases where a car could be taken by intimidation even though the offender had a specific intent to cause serious bodily harm. Petitioner's Br. at 25-26. The respondent responds by arguing that it would find in both cases the car was taken by force and violence. Respondent's Br. at 22 n.11. But the respondent ignores the fact that a reasonable jury might find that without injury there has not been violence, and a reasonable jury might also find that an offender who injures a victim *after* taking possession of the car has not "take[n]" the car by force and violence. In both cases the reasonable jury should still convict because the car was taken by "intimidation."

old statute, which did not have an intent requirement, conditional or otherwise, is not justification for the respondent's attempt to override the plain text that Congress enacted. Congress made a reasoned decision to change the scope of the carjacking statute which included reducing the number of cases whereby a car was taken by intimidation. By claiming that conditional intent must be read into the statute to ensure that the reach of the statute to acts of intimidation remains unchanged, the respondent simply seeks to ignore the statute's plain text. *See Bass*, 406 U.S. at 344 ("While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these building principles are not substitutes for congressional lawmaking.").

The respondent also advances the dubious argument that the penalty provision of Section 2119, which authorizes a penalty of up to 15 years for any carjacking regardless of whether there was serious bodily harm, reinforces the conclusion that the statute contemplates conditional intent. The respondent reasons that "it is difficult to imagine many cases in which the respondent will be able to prove an unconditional intent to cause serious harm, but in which such harm will not in fact have resulted." Respondent's Br. at 24. Under the respondent's theory then, it is illogical to have a different penalty for murder than attempted murder, because there would be an "implausibly small" number of cases in which the murderer does not achieve his goals.

The respondent's theory, even if it could contradict the statute's plain meaning, is nonsensical. A defendant's

intent to cause serious bodily harm or death will inevitably have varying possible consequences. A defendant may fully intend to use a knife or gun when he confronts a driver whose immediate flight enables the latter to escape injury. In addition, a carjacker may strike or fire a shot at a victim with the requisite intent and yet a serious injury may not result. Obviously in these cases, the carjacker would be punished under the first penalty clause in Section 2119, which provides for up to 15 years of imprisonment. In a case where such an intent actually causes serious injury or death, the defendant would be subject to the enhanced penalty provisions provided by the second and third penalty clauses.

The contention that in virtually every instance where a defendant possesses an intent to cause serious bodily harm or death, such an injury will inevitably result, is illogical. Consequently, this contention fails to provide any support for reading conditional intent into the carjacking statute.

V. The Rule Of Lenity Requires The Reversal Of Petitioner's Conviction

Finally, despite the respondent's claims to the contrary, lenity requires an interpretation of the carjacking statute in petitioner's favor. The respondent concedes that the rule of lenity applies when "a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies' of the statute." Respondent's Br. at 32 (emphasis in original) (quoting *United States v. R.L.C.*, 503 U.S. 291 305-06 (1992) (internal quotations omitted)). This

three-part test established by the Court demonstrates that the rule of lenity applies in this case. First, the respondent has, at best only demonstrated ambiguity regarding the text and structure of the statute. Indeed, if the text clearly supported the respondent's position, the respondent would not be reduced to asking the Court to use *"common law and common sense"* to interpret the statute. Respondent's Br. at 32 (emphasis added). Second, the respondent concedes that the "legislative history" is not "useful" for interpreting the statute. Respondent's Br. at 31. Finally, the respondent concedes that the motivating policies are unclear because "there is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement." *Id.* (quoting the opinion below).

As petitioner has demonstrated, the respondent's attempt to add the concept of conditional intent to the carjacking statute: (1) finds no support in the language of the law; (2) has no sound roots in the common law; (3) unquestionably reduces the *mens rea* legislated by Congress; and (4) expands the reach of the law in a manner which at best raises serious questions concerning whether such an interpretation is consistent with Congressional intent.

Thus, as demonstrated in petitioner's brief, even if this Court were to reject petitioner's showing that the carjacking statute's text and structure requires an unconditional intent, the respondent can, at best, hope for a determination that a "grievous ambiguity" exists in the law. Because nothing in the language of the statute or its legislative history even mentions the concept of conditional intent, reading that concept into the statute would

clearly represent "'no more than a guess as to what Congress intended'," *Muscarello v. United States*, 118 S. Ct. 1911, 1919 (1998) (citations omitted), which is prohibited by the rule of lenity.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioner's opening brief, petitioner's conviction should be reversed.

Respectfully submitted,

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